WHAT ATTITUDE SHOULD THE GOVERNMENT ASSUME TOWARD THE TRUSTS?

EVERY generation has problems peculiar to itself for settlement. This fact might well be said to be the test of progress. If a people were dormant, no new questions of any moment would arise. It is only when new policies are entered upon, calling for a determination of conduct toward that policy, that the most serious reflection, followed by action, is demanded and commanded. Judging from discussions, both by the press and by legislative assemblies, the trust problem must be conceded as one of those grave questions with which we must cope.

The principle of combination is not a new one, and the main difference between the combination of today and that of a hundred years ago, aside from the mere matter of form, is but a difference of degree. The industrial surroundings, however, in which each existed are quite diverse. A hundred years ago there were no elaborate systems of railroads, no telegraph systems, no telephone lines, but all communications were through primitive methods. As a result of such conditions the effect of any combination, for good or for evil, was necessarily limited to a very small market area. The combination of today—or the modern "trust," as it is popularly called—possesses a more far-reaching influence. With the improved means of communication that have been developed in the United States, combinations have been effected uniting plants as far distant as is the Atlantic from the Pacific. For instance, the American Sugar Refining Co. owns plants, that once were independent, in Philadelphia on the east and San Francisco on the west. Under such conditions the effect of a combination in a single industry may extend over the entire area of the United States, and in some cases even beyond the seas.

It is evident that, through a more or less gradual transition, we are confronted with a new problem, which has of recent years been agitated with great vigor, seemingly for the purpose of

making political capital, though this may be a mistaken inference. State and national legislation has been enacted, courts have rendered decisions, further combination has, in some instances, been enjoined; but from all appearances no permanent solution has been adduced.

Much as has been said, both *pro* and *con*, upon this question, one need not apologize for attempting something new, or even a repetition of old arguments in a new way; for should no influence be manifested upon others, the author himself will have gained much that may materially aid him in taking action. Realizing the difficulty of intelligently discussing the action that has been taken on the trust problem, and much more in attempting an offer of suggestions for a solution, without understanding the real nature of that problem, I propose to discuss the three following divisions:

1. The true nature of the trust problem, so far as it applies to industrial combinations, exclusive of railroad mergers.

2. The action that has been taken toward the movement by legislatures and courts.

3. The attitude that should be assumed toward the concentration of capital in order to preserve the benefits of that movement, at the same time eliminating, as far as possible, the dangers connected therewith.

Now, as to the first, what is the true nature of the trust problem; that is, is the question, How shall we destroy or prevent combination and concentration? or is it, How shall we utilize and control, if need be, the consolidated units? To give an answer, one must consider the movement itself and determine whether it is the resultant of natural economic forces, or merely an artificial device for reaping great returns by the capitalist at the expense of the public, and endangering the existence of free government.

While it is true that, in the recent craze for combination, the movement has been characterized somewhat by a spirit of speculation, yet the general movement has been the result of economic forces. Everyone recognizes that the change from domestic manufacture to the factory system was an economic one, but some are inclined to doubt as to the more recent consolidation

of these already large units of production. It is not within the scope of this thesis to enter into a detailed process of reasoning to show that even this recent trust movement is economic in its nature. We have, however, ample testimony to that effect from men most qualified to speak. Says John Bates Clark, the dean of American economists, in his *Modern Distributive Process:*[1] "Combinations have their root in the nature of social industry, and are normal in their origin, their development, and their practical working." Again in *The Control of Trusts*[2] he says: "American industry has gone through a rapid and startling evolution." Says John A. Hobson, the noted London economist, in *The Evolution of Modern Capitalism:*[3] "The trust is the logical culmination of the operation of economic forces." Judge Peter S. Grosscup, of the United States Circuit Court of Appeals for the seventh circuit, in an address before the University of Nebraska College of Law, last fall, after characterizing the movement as the "instinct of the times," asks: "Can a development so persistent be entirely unnatural? Can we successfully repeal what appears to be the fixed law of economics?" And President Roosevelt, in an address before the Merchants' and Manufacturers' Association of Milwaukee, April 3 last, said: "We recognize them [the big corporations] as being in many cases efficient economic instruments, the result of an inevitable process of economic evolution." As to the speculative nature of the movement, J. W. Jenks, of Cornell University, says in *The Trust Problem:*[4] "The worst period of speculative organization has, in all probability, passed;" which conclusion is also reached by the United States Industrial Commission in its final report.[5] We may conclude, then, in the words of President Hadley, of Yale: "So far as the present tendency toward industrial combination is a financial movement for the sake of selling securities, it is likely to be short-lived. So far as it is an industrial movement to secure economy of operation and commercial policy, it is likely to be permanent."[6]

[1] Edition 1888, p. 11.

[2] Edition 1901, p. 1.

[3] Edition 1899, p. 126.

[4] Edition 1903, p. 95.

[5] Vol. XIX, p. 600.

[6] *Education of American Citizen*, p. 50.

Not only is the movement toward combination the work of natural economic forces, but it possesses certain positive advantages for society, which may be said to be either actual or potential. Without attempting to discriminate between these two classes of benefits, suffice it to say that, if they are actual, then we are already enjoying them, and if they are potential, there must be some way to secure them for the use of society. Some of these advantages are: (1) the opening of new markets; (2) the production of new inventions, resulting in better machinery; (3) the employment of minor processes in connection with the main process; (4) increased efficiency in management; (5) the utilization of waste product; (6) capacity to try new experiments; (7) the reduction in the cost of selling, especially when the reputation of any commodity depends upon the establishment of popular brands through advertising; (8) the saving of cross-freight rates; (9) the steadying of prices and the regulation of production to meet demand, which reduces the likelihood of panics; and (10) the bettering of the conditions of labor, by improved sanitary environment, shorter hours, higher wages, continuous employment, and by the facilitation of labor organizations.[1]

Great as these advantages may seem, there are manifest evils apparently connected with the movement. For instance, the large combinations, mainly through the enjoyment of freight-rate discriminations, are able to crush out competition by local rate-cutting, and abnormally raise prices in other localities; they corrupt our courts and legislatures; they float their securities upon the market, thereby causing great speculation; they over-capitalize their earning power, and thus rob the investor of his legitimate dividends.[2]

However, the greatest evil charged against the combinations

[1] HOBSON, *Evolution of Modern Capitalism*, p. 117; ELY, *Monopolies and Trusts*, p. 195; *Report of Industrial Commission*, Vol. XIX, pp. 608, 610–12, 614; BURTON, *Crises and Depressions*, p. 301; LE ROSSIGNOL, *Monopolies, Past and Present*, p. 233; GUNTON, *Banker's Magazine*, February, 1903; *Census Report*, Vol. VII, p. lxxxi.

[2] *Report of Industrial Commission*, Vol. XIX, pp. 615, 616, 621; F. A. VANDERLIP, *Banker's Magazine*, November, 1902; J. R. COMMONS, *Independent*, May 1, 1902; JENKS, *The Trust Problem*, pp. 93, 106.

is their monopolistic power, enabling them arbitrarily to raise the prices of the finished product, or depress prices of the raw material, in either case exacting or obtaining an increased margin of profit. What is the cause of this monopolistic power? Does mere mass of capital produce it? What do the authorities say? Professor J. B. Clark, in *The Control of Trusts*,[1] says: "Great corporations would never be monopolies if competition were not abnormally fettered." Professor R. T. Ely, in *Monopolies and Trusts*,[2] says: "No one has yet adduced an instance of an important monopoly based upon mere mass of capital, or upon mere combination without external aid." And again,[3] he says one must "fail to discover any approximation whatever toward a proportion between mass of capital and the extent to which monopoly obtains, or the progress made in the direction of monopoly." The committee appointed to revise the Massachusetts corporation laws, reporting in January, 1903, of which F. J. Stimson, the legal adviser to the Industrial Comission was a member, says[4] in its report:

> Moreover, it is apprehended that the question of monopoly, or rather the abuse of large corporations, does not result necessarily from the size of the corporations engaged in business throughout the United States. . . . . In the opinion of the committee, the question of capitalization is not a contributing factor in the fight for monopoly.

Why is it, then, that the possession of vast aggregations of capital cannot give true monopoly power? So long as wealth exists throughout the community, just so long can capital be amassed to compete with other units of amassed capital. This possibility of creating competing units of capital is known as "potential" competition, and its effect, when not abnormally fettered, in restraining monopoly, is of no small value. But it is said that the combinations do "abnormally fetter" competition. The only way any combination can unduly fetter competition is by practicing what is known as "local rate-cutting;" that is, whenever a competitor springs into existence, the combination will sell in that community below cost and drive him to the wall. But this practice can be successfully carried on

[1] P. 12. [2] P. 174. [3] P. 177. [4] P. 23.

only through special privileges from railroads in the form of secret rebates. It is reasonable to believe that if there were no freight-rate discriminations, there could be no killing of competitors without making use of the economies resulting from combination, and thus at the same time giving the public the benefit of a low-priced commodity.

So long as there are economic benefits resulting from combination, that movement should not be checked merely because competition is apparently fettered, unless it be shown, not only that these benefits cannot be secured for the consumer, but that independent dangers accompany concentrated capital of such a nature as to necessitate its destruction. The Industrial Commission, than which there is no higher authority in the United States, says, in its final report on "Industrial Combinations,"[1] that the advantages of superior management, saving of cross-freight rates, and the introduction of improved methods in all the combined plants immediately must always remain with the combination.

To the writer's mind, then, the present movement being a natural economic evolution, possessing benefits for society, and likewise apparent dangers, the real problem is to see if it is not possible to minimize, if not eliminate, the evils, at the same time retaining the advantage they present. President Roosevelt, in his speech at Milwaukee on April 3, mentioned above, presented the real problem when he said:

> I think I speak for the great majority of the American people when I say that we are not in the least against wealth, as such, whether individual or corporate; that we merely desire to see any abuse of corporate or combined wealth corrected and remedied; that we do not desire the abolition or destruction of big corporations; but, on the contrary, recognize them as being in many cases efficient economic instruments, the result of an inevitable process of economic evolution; and only desire to see them regulated and controlled so far as may be necessary to subserve the public good.

Accepting this, then, as a statement of the real problem with which we must deal, let us next consider what action has been taken to effect a solution.

The general character of legislation enacted by some thirty-seven states and territories of the Union has been truly "anti-

[1] Vol. XIX.

trust." The aim seems clearly to have been the prevention of combination and concentration. The first movement toward combination was the true trustee agreement, under which the management of several formerly independent concerns was given over to a central body of trustees who issued trust certificates which were exchanged for the stock of the formerly independent concerns. Whenever this was done it was almost certain that some of the plants were closed, as in the case of the original whisky trust. This was considered injurious by the popular mind, since it prevented the full effect of competition; and the anti-trust enactments resulted. The Industrial Commission in Vol. II of its report, through J. W. Jenks, expert agent, has collated all the anti-trust laws, together with the leading cases decided under them. The general character of these laws thus brought together may be readily ascertained, and the striking feature about them is their similarity in phraseology and aim. To illustrate the general type: Arkansas prohibits all combinations which tend to lessen free competition in importation, production, or sale of goods; or to regulate or fix prices.[1] Illinois prohibits any trust, pool, combine, confederation, agreement, or understanding for regulating or fixing the price of goods, or to fix or limit the quantity to be made or sold; also owning or issuing trust certificates.[2] Missouri prohibits creating or maintaining a trust, pool, combine, agreement, confederation, or understanding to regulate or fix prices on goods, or to fix or limit the quantity to be made or sold.[3] Nebraska prohibits confederation to regulate prices on goods, or to fix the quantity to be made or sold; combinations to prevent competition between grain dealers.[4] New York prohibits combinations creating monopoly in the production or sale of any commodity of common use, or restraining competition in the supply or price.[5] This is sufficient to show that the popular mind considered any

[1] *Laws*, 1897, Act 46, and 1899, Act 41.

[2] *Laws*, 1891, p. 206; 1893, p. 182.

[3] *Laws*, 1891, p. 186; 1899, pp. 316, 318, 320.

[4] *Laws*, 1897, chaps. 79, 80.

[5] *Penal Code*, sec. 168; *Laws*, 1897, chap. 384, sec. 7; 1899, chap. 690.

movement toward a combination of independent concerns as detrimental to the public welfare.

Many states in their hasty legislation made exceptions to their sweeping enactments, as a result of which they contravene the federal constitution, and consequently are a nullity. The usual exception seems to be agricultural and labor interests. For instance, the Illinois act of July 1, 1893, provided that "the provisions of this act shall not apply to agricultural products or live stock while in the hands of the producer or raiser." In Connolly *vs.* Union Sewer Pipe Co.[1] the court held that this exception clause tainted the whole act and rendered it void, since it denied equal rights as guaranteed by the Fourteenth Amendment. This decision by the United States Supreme Court really invalidates, for the same reason, the anti-trust legislation of Georgia, Indiana, Louisiana, Michigan, Mississippi, Montana, Nebraska, North Carolina, South Dakota, Tennessee, Texas, and Wisconsin.

Such has been the state legislation against the trust. It has been effective in its aims so far as it sought to destroy the old trustee agreement, but as to the prevention of the working out of the principle of combination, it has been equally ineffective. No sooner had the trust been dissolved than a new corporation was formed, which, exercising the right of free contract, purchased outright a controlling interest in the stock of the independent concerns and issued its own in return.

National legislation concerning combinations has been crystallized into three enactments:

1. "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies."[2] This act provides:

> Every contract, combination in any form or trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal.

2. "An Act to Reduce Taxation and Provide Revenue for the Government and for Other Purposes."[3] Beginning with paragraph 73, this act provides:

> That every combination, conspiracy, trust, agreement, or contract is

[1] 184 *U. S.*, 540. [2] 26 *Statutes at Large*, 209. [3] 28 *Statutes at Large*, 570.

hereby declared to be contrary to public policy, illegal and void, when the same is made by or between two or more persons or corporations either of whom is engaged in importing any article from any foreign country into the United States, and when such combination, trust, conspiracy, agreement, or contract is intended to operate in restraint of lawful trade, or free competition in lawful trade or commerce, or to increase the market price in any part of the United States of any article or articles intended to be imported into the United States, or in any manufacture into which such imported article enters or is intended to enter.

3. "An Act to Regulate Commerce."[1] Sec. 5 provides:

That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any contract, agreement, or combination with any other common carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads or any portion thereof.

The aim of these acts is a good one. The ultimate result sought, I take it, is not the prevention of combination as such, but of the *abnormal* restraint of trade. The anti-trust act of 1890, however, with its sweeping words, condemns *every* combination, no matter how reasonable its effect in restraining trade might be. Under this act the whisky trust was dissolved,[2] but through the organization of the Distilling Co. of America, the interests were nevertheless unified; and similar results were produced in other lines of industry.

Probably the three most interesting, as well as instructive, cases arising under the National anti-trust legislation are United States *vs.* E. C. Knight Co.,[3] Addyston Pipe and Steel Co. *vs.* United States,[4] and the recent Northern Securities case.[5] To the writer's mind, these three cases represent a gradual extension of governmental power through judicial decision. The facts in the Knight case were as follows: The American Sugar Refining Co., a New Jersey corporation, controlling a large majority of the sugar refineries in the United States, purchased a controlling interest in the stock of four Philadelphia refineries, thus obtaining a practical monopoly of the sugar business throughout the

[1] 24 *Statutes at Large*, 379.

[2] *In re* Corning *et. al.;* U. S. *vs.* Greenhut *et. al.*, 51 *Fed.*, 205.

[3] 156 *U. S.*, 1. [4] 175 *U. S.*, 211.

[5] U. S. Circuit Court, eighth circuit, not yet officially reported.

United States. The United States filed its bill to have the purchases set aside as contrary to the anti-trust act of 1890. In dismissing the bill, the court pointed out that:

> The regulation of commerce applies to the subjects of commerce and not to matters of internal police. Contracts to buy, sell, or exchange goods to be transported among the several states, the transportation and its instrumentalities, the articles bought, sold, or exchanged for the purposes of such transit among the states, or put in way of transit, may be regulated, but this is because they form a part of the interstate trade or commerce. The fact that an article is manufactured in another state does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the state and belongs to commerce.

After concluding that monopolies in the manufacture of a necessary of life are not covered by the act, the court says: "There was nothing in the proofs to indicate any intention to put a restraint upon trade or commerce." Note the word "intention," for its use in this connection seems to indicate that, if there had been proof of the intention, together with the indirect restraint of trade, the court might have sustained the bill.

In the second case, Addyston Pipe and Steel Co. *vs.* United States, the United States sought to break up, under the anti-trust act of 1890, an association formed between six corporations manufacturing cast-iron pipes, supplying thirty-six states, for the purpose of eliminating competition. The court in dissolving the association said:

> As has frequently been said, interstate commerce consists of intercourse and traffic between the citizens and inhabitants of different states, and includes not only the transportation of persons and property, but also the purchase, sale, and exchange of commodities. . . . . If, therefore, an agreement or combination directly restrains not alone the manufacture, but the purchase, sale, or exchange of the manufactured commodity among the several states, it is brought within the provisions of the statute.

Now, it will be readily seen that the purchase of the Philadelphia refineries by the American Sugar Refining Co. would produce practically the same effect upon the "purchase, sale, or exchange of the manufactured commodity among the several states" as it did in the association of the cast-iron pipe manufacturers, and the former combination seems to have been

upheld solely because the *intention* of restraining interstate commerce was not shown.

In the recent Northern Securities Co. case the court seems to have gone one step farther. This case does not properly come under our discussion, because it has to deal with the law of railroad mergers, which has been excluded from this thesis, as pointed out above. It is invaluable, however, as indicating the development of the criterion in determining whether or not an act or combination is in violation of the anti-trust act of 1890. It is for the purpose of illustrating this development, and that alone, that the case is introduced here. The facts in the case were as follows: The Northern Pacific and the Great Northern Railroads are parallel, and heretofore competing roads, running from the Mississippi River to Puget Sound. The Northern Securities Co., a corporation organized under the laws of the state of New Jersey, purchased a large majority of the stock of both the competing roads. The question before the court was whether such a combination was a violation of the anti-trust law which forbids all combinations "in restraint of trade or commerce." The defendants urged that it was not, on the following, among other grounds: (1) that anyone may legally hold property to any extent, and the anti-trust act only restricts the *use* of that property; (2) that they can be enjoined from doing any act in restraint of trade, but that mere combination does not constitute such an act; (3) that the combination was formed, not to restrain, but to promote commerce, thus benefiting the public. The court, four judges sitting, unanimously held that the combination was illegal and void, and thus overruled the defenses interposed. This means that under the anti-trust act of 1890, combinations, though legally incorporated, may be dissolved, even though there be no intention to restrain trade, but even where benefits might inure to the public. The mere fact that competition is eliminated is sufficient to condemn the combination under this act, providing it affects interstate commerce.

Besides enlarging the construction of the anti-trust act, many think this recent decision announces the principle that shall solve the problem of corporate abuses in the United States.

William R. Merriam, formerly governor of Minnesota, and until recently United States census director, voiced this idea in an address before the St. Paul Credit Men's Association, April 16 last, when, discussing the decision, he said:

> While the right of private ownership is bestowed upon every citizen of this country under the constitution, no man and no corporation shall be permitted to use that ownership to the extent of injuring his neighbor or menacing the public good. If I am right in this conclusion, no corporation doing business in the states can destroy its rivals by a disastrous cut in prices, or raise prices of products to the point of oppression. . . . . The conclusion is irresistible that in the central government rests the power to determine that the individual or the corporation doing business that is interstate in its character cannot hold, maintain, or operate any property that results in injury to the public.

These sanguine views may be correct. However, it is well to consider whether or not it would be possible so to frame our legislation as to secure the benefits of combination and remove the sources, external to the combination itself, from which many evils flow.

It was stated above that the three anti-trust acts enumerated constituted the sum of the federal enactments upon this subject. This statement, however, is not technically correct, for during the last session of Congress two acts were passed, the ultimate effect of which cannot as yet be foretold, namely, the Elkins anti-rebate law and an act establishing a Department of Commerce and Labor, with a subdepartment known as the Bureau of Corporations.

The Elkins law aims at strengthening the Interstate Commerce Act, and provides that the *taker* of rebates, as well as the giver, shall be criminally liable. It seems that a rigid enforcement of the law would make discriminations practically impossible, since under this law discrimination does not need to be shown, but merely a departure from published rates; and the failure to publish rates is itself punishable. Again, this law abolishes imprisonment for violation of the act, and substitutes therefor a fine upon the corporation of from $1,000 to $20,000. This makes punishment more certain, for it is said that under the old law evidence that would lead to the imprisonment of

persons was almost unobtainable. Another very important change introduced by this law is that courts are authorized to proceed civilly, and to enjoin illegal actions, which are more elastic than under the criminal procedure. Complaints are already being filed under the new law with the Interstate Commerce Commission, the first one being by the Central Yellow Pine Association, a voluntary association of forty-one firms in Louisiana, Mississippi, Georgia, and Alabama, and engaged in the manufacture and shipping of pine lumber in and from Louisiana (east of the Mississippi), Mississippi, Alabama, and Georgia, against the Vicksburg, Shreveport & Pacific, the Kansas City Southern, the St. Louis, Iron Mountain & Southern Railroads, because of alleged rebates to firms engaged in the same business in Arkansas and Louisiana (west of the Mississippi). As yet, however, no decisions under the Elkins law have been handed down.

The act creating the new Department of Commerce and Labor declares that the commissioner of corporations "shall have power and authority to make, under the direction of the secretary of commerce and labor, diligent investigation into the organization, conduct, and management of the business of any corporation, joint-stock company, or corporate combination engaged in commerce among the several states and with foreign nations, *except* common carriers;" and "to gather such information and data as will enable the president of the United States to make recommendations to Congress for legislation for the regulation of such commerce." In furtherance of these provisions the commissioner is given power to "subpœna and compel the attendance and testimony of witnesses and the production of documentary evidence, and to administer oaths." This truly constitutes an extension of governmental power, and is made to apply to concerns, exclusive of railroads; or, in other words, mainly to manufacturing "corporations, joint-stock companies, or corporate combinations." The movement is purely experimental and is, in a way, an application of the much-talked-of publicity; but, nevertheless, important and surprising consequences may follow these investigations by the government into the conduct of big corporations.

To summarize, then, as regards the attitude assumed toward combination by both state and national legislatures, it has been destructive with the exceptions of the federal act establishing the Department of Commerce and Labor, and the anti-rebate law. If the conclusion reached above as to the real nature of the problem is correct, then the entire legislation relative to industrial combinations, with the exceptions just enumerated, has been based upon a false principle. The futility in the accomplishment of its aim seems to demonstrate this beyond a reasonable doubt.

If, then, improper action has been taken regarding this important problem, what stand shall we now take? It is often popularly charged that one disapproving of the strictly "anti-trust" attitude, heretofore assumed, is in favor of trusts, in favor of monopoly, in favor of crushing out competition, and in favor of all the evils that may accompany the concentration of capital in the hands of single private industrial corporations. This is hardly fair. It may be that some do favor a strictly *laissez-faire* policy. The writer, however, believes that James B. Dill, the noted corporation lawyer of New York city, stated the proper doctrine in an address before the Seminary in Economics of Harvard University, March 10, 1903, when he said:

> The safe principle, however, is found in the statement that the "trust problem" is not the problem of abolishing industrial combinations, but of properly applying the principles which they represent, recognizing that they are a power national in extent and a necessary subject of federal jurisdiction.
>
> The basis of discussion as to the legal control of combinations must be not primarily utility, and secondarily control, but utilization and control standing *pari passu*.

Granting that some sort of control is necessary, one question of prime importance is whether that control should be exercised by the several states and federal government dually, or whether the entire responsibility should be assumed by the latter. To me the last plan is preferable. The trust of today is a force that exerts a national influence. The large corporations, creatures of the states, are not confined to state boundaries in their dealings, but, on the contrary, many of them operate in almost every state

of the Union, and I dare say that of the 183 industrial combinations enumerated in the twelfth census none operate in one state alone. Not only are their operations across state lines, but their stock is also owned throughout the United States. So, from that one standpoint alone, it would seem that a proper subject for national consideration was presented.

But there is another reason why federal control would be preferable to the present scheme. It is a notorious fact that there is no uniformity in state legislation concerning industrial combinations. For instance, Massachusetts requires "public" publicity of all corporations. New Jersey requires only "private" publicity; that is, gives only the stockholder the right of inquiring into corporate conditions. Different states likewise differ as to what constitutes the proper basis of capitalization. Not only is there this lack of uniformity, but there appears to be a tendency toward a still wider diversion. James B. Dill, in the address above referred to, sums up the situation very clearly, and I quote his words:

> We find some charter-granting states legislating for the following classes of corporations:
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> 1. Corporations organized primarily for the purpose of doing business outside the state.
>
> 2. Corporations organized for the purpose of doing without the state business which is forbidden within the state which created them.
>
> 3. Those formed for the purpose of doing their business as an entirety outside the state, being specifically forbidden by their charters from operating or carrying on such business in the state which created them.
>
> 4. For the express purpose of doing business in evasion, sometimes in violation, of the law of a state into which they purpose to go and operate.
>
> On the other hand, we have states attempting to tax property of corporations—as the state of New York in the case of United Verde Copper Co. (People *ex rel.* U. V. C. Co. *vs.* Feitner, 54 *App. Div.*, 217)—not within their limits and therefore taxed elsewhere; we have some states attacking domestic and foreign corporations with laws intending to make it difficult to associate capital for commercial operations too large for individuals.

The creation of the Land Grant Railway and Trust Co. by Pennsylvania in 1870 gave that company the right to exercise banking powers "in any state, territory, or country except the state of Pennsylvania." In writing the opinion in a case decid-

ing that this corporation could not do business in the state of Kansas, Judge Valentine said:

> At the very creation of this supposed corporation, its creators spurned it from the land of its birth as illegitimate and unworthy of a home among its kindred and sent it forth a wanderer on foreign soil. Is the state of Kansas bound by any kind of courtesy, or comity, or friendship, or kindness to Pennsylvania to treat this corporation better than its creator is bound?
>
> No rule of comity will allow one state to spawn corporations, to send them forth into other states to be nurtured and do business there, when the state first among states will not allow them to do business within its own boundaries.[1]

This illustrates one of the tendencies in state legislation on this important topic, and the lack of uniformity and comity is amply demonstrated. For this reason, then, that legislation, already lacking in uniformity, is becoming still more adverse, national legislation should be substituted for state legislation upon this topic which has passed from local to national interest.

Considerable discussion has been indulged in as to the power of Congress to legislate for the control of the industrial combinations. Many have expressed the opinion that an amendment to the federal constitution is a necessary prerequisite. The weight of authority, however, seems to be that no such amendment is necessary, and that Congress has ample power to deal with the problem under its powers over interstate commerce. So says F. J. Stimson, the legal adviser to the industrial commission;[2] E. W. Huffcutt, of Cornell University;[3] and Attorney-General Knox expressed himself as follows at Pittsburg, Pa., October 14, last:

> Conceding that the present law is not effective throughout the situation, we come to the final alternative: May not Congress, under the existing constitutional grants, amend and extend the law, and thus remedy the defects, and so effectively regulate national and foreign commerce as to prevent the stifling of competition, the regulating of output and price, and the restraining of national and international trade? If the answer to this question should be in the affirmative, a second question follows: How might Congress so amend the present law?

[1] Land Grant Railway and Trust Co. *vs.* Board of County Commissioners, Coffey County, 6 *Kansas*, 149.

[2] *Report of Industrial Commission*, Vol. XIX, p. 628. [3] *Ibid.*, p. 712.

I do not scruple to say that in my judgment the more a thoughtful mind reflects on the first question, the more unhesitatingly will an affirmative answer be returned.

That regulation by Congress in this way would indirectly or remotely affect production would be no bar. The very point of the sugar-trust case was that a consolidated scheme of production might lead to commerce, or might indirectly or remotely affect commerce, but did not for that reason invoke the federal power over commerce; and the illustration from the converse of the situation is significant on the point just stated.

Congress under this power prevents the importation or transportation of articles deemed injurious to the general welfare. Thus the laws subject the movement of explosives to safeguards and burdens; absolutely excludes impure literature and diseased cattle, convicts and contract labor; and scrutinizes and prevents or checks many foreign and interstate movements, throughout the entire field of national and international intercourse, in the interest of all the people, on the ground of commercial, hygienic, or ethical policy. Who shall set limits now, in advance of a carefully framed and judicially tested law, to the competence of Congress to regulate commerce in the way suggested, in the exercise of the legislative wisdom and the wide discretion confided to it? Who shall say that the power of Congress does not extend so far? I think it does. I am quite sure that no one can now say that it does not.

As to suggesting specific legislation for the control of industrial combinations, that is beyond the scope of this thesis. To the writer, however, it seems that we know too little of the real nature of the problem presented to rush headlong into any legislation. Attorney-General Knox in the address above referred to stated well the conditions when he said:

The conditions of our commercial life are, as I have said, the result in part of an evolution of forces of world-wide operation. They have developed gradually and are not, perhaps, fully understood. Laws regulating and controlling their operation, before they ripen into a complete system of jurisprudence, will be of gradual growth.

It is to be hoped that from the investigations that undoubtedly will be pursued by the new Department of Commerce and Labor some proper basis may be formed to determine the precise nature of action necessary. If it be found necessary to institute publicity, then, by all means, let us have publicity through this new department. If it is found that combinations are given abnormal power through the possession of special privileges, as freight-rate discriminations or a prohibitive tariff,

then let us first abolish those special privileges and place all on an equal footing.

Then, in conclusion, what have we found? We have found, first, that the industrial combination is the resultant of economic forces, possessing advantages for society, also perhaps real dangers; second, that legislation, without attempting to preserve these advantages and destroy the apparent evils, has aimed at a destruction of the combination; third, that the attitude now to be assumed is that of an inquiring student, and attempt to locate the source of abuses, and see if a removal of these sources will not do much toward bringing about a solution. By assuming this impartial attitude, and by guarding carefully against mistaking cause for effect, it seems reasonable that much can be done to aid materially in building up and perpetuating the industrial and commercial supremacy of the United States.

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